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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

HUGH HENDERSON, Individually and by J. WILLARD GRAGG, His Next Friend Appointed by the Court, Petitioner,

vs.

SHELL OIL COMPANY, INC.; NATIONAL SURETY CORPORATION; HARTFORD ACCIDENT AND INDEMNITY COMPANY; W. L. MOUNT; CLARA GRAGG; J. L. GRAGG; RUBY BUNTING; FRANK BUNTING; MYRTLE HENDERSON, Individually and as Executrix of the Estate of M. L. HENDERSON, Deceased; RUTH GARRETT; MULDROW GARRETT; GRACE B. OHEIM, Individually and as Executrix of the Estate of A. J. OHEIM, Deceased; MAY KARSTERER, Individually and as Administratrix of the Estate of SYLVESTER KARSTERER, Respondents.

No. 218.

PETITIONER'S REPLY BRIEF.

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SUMMARY OF ARGUMENT.

I.

Respondents' several arguments based on the false premise that Hugh Henderson is or was insane are not sound. Henderson's sanity is presumed. Whether he has been legally adjudged insane is the question for decision in this case.

II.

Neither of the Texas sanity and guardianship proceedings was based on an asserted prior adjudication by a Missouri court that Hugh Henderson was insane. There is no competent evidence in the record that Henderson

was ever adjudged insane by a Missouri court. The Texas proceedings were entirely independent.

Articles 4132 and 4285, Vernon's Revised Civil Statutes of Texas.

III.

The "notice" served on Henderson in Missouri in the 1939 insanity-guardianship proceeding in Texas was not authorized nor required by the Texas law. Therefore, it cannot supply any constitutionality to the Texas proceedings in 1939.

Coe v. Armour Fertilizer Works, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027;

Wuchter v. Pizzutti, 276 U. S. 13, 38 S. Ct. 259, 72 L. Ed. 446.

IV.

Hugh Henderson's mere physical presence in the Courtroom in Texas during the 1939 sanity-guardianship "hearing" was not "**an appearance**" and is of no legal consequence. Henderson was not asked a question, was not placed on the witness stand, did not testify, made no statement, said nothing, and nothing was said to him, he signed no papers and had no attorney or guardian ad litem. No jury was present. Henderson waived no jury.

Hugh Henderson's application thereafter to the District Court in Texas to set aside the purported action of the County Court could not supply the defect in "process" in the County Court which he sought to attack. Moreover, District Courts in Texas have no jurisdiction to determine sanity and appoint guardians. It having been alleged in those proceedings that Henderson was insane, he could not waive the issue of process.

Thomason v. McGeorge (Tex. Comm. App.), 285 S. W. 285;

4 Tex. Jur. 624;
North v. Washtenaw, 59 Mich. 624, 26 N. W. 810;
Snyder v. Superior Court, 206 Calif. 346, 274 Pac. 337;
State ex rel. Terry v. Holtcamp, 330 Mo. 608, 51 S. W. (2d) 13;
Story v. Story (Tex. Civ. App.), 105 S. W. (2d) 370.

V.

There was no real or attempted seizure of Henderson's Texas property in either of the Texas sanity-guardianship proceedings until after the Texas Court has purportedly adjudged Henderson to be insane and purportedly appointed a guardian.

VI.

The decision of this Court in Chaloner v. Sherman, 242 U. S. 455, does not control this case. In that case both the alleged incompetent and his property were in the State of New York when the proceeding was instituted, and there was personal service on the alleged incompetent within the State of New York.

VII.

The confusion regarding "due process" in insanity proceedings is further manifested and demonstrated by the number of citations in respondents' briefs and the many distinctions undertaken by the courts in those cases, as well as those undertaken by petitioner, so that it is most apparent that this Court should grant a writ of certiorari and settle the law in this important respect.

ARGUMENT.

I.

Respondents attempt to escape the collapse of their structure based upon "undue process," which will inevitably follow the decision of this Tribunal, by hastily laying down a smoke-screen to obscure a decision on the merits and secure their ill-gotten gains obtained by illegal and undue process, by an attempt to misstate the facts and draw a false conclusion from such wrongful premise. They therefore lay down two erroneous propositions:

> **First**: That as Petitioner had already been legally declared insane in **Missouri**, his illegal declaration of insanity in **Texas** was justified; and
>
> **Second**: That in any event, during a hearing Petitioner walked in and out of the Courtroom, thereby waiving all illegal process and entering his personal appearance in Texas.

Almost ninety percent of the brief of Respondent W. L. Mount is based on the false premise that Hugh Henderson is insane. That is the very question to be determined in this case. The decisions of the Texas Courts which are under attack here are based in part on the same false premise.

The other arguments of Respondent Mount and the argument of Respondent Shell Oil Company in regard to Hugh Henderson's mere presence in the County courtroom during the 1939 proceeding against him, and his application to the District Court to avoid and set aside the purported judgment of the County Court, are to the **contrary**. These arguments assume Hugh Henderson to be sane. If he were insane he could not have bound himself, either by a personal presence or a purported appearance. District Courts in Texas have no jurisdiction to determine sanity. That jurisdiction is vested in County Courts. Article 4102,

Vernon's Revised Civil Statutes of Texas. And the law is generally accepted to be that one who is alleged to be insane cannot waive issuance and service of process. North v. Washtenaw, 59 Mich. 624, 26 N. W. 810; Snyder v. Superior Court, 206 Calif. 346, 274 Pac. 337; State ex rel. Terry v. Holtcamp, 330 Mo. 608, 51 S. W. (2d) 13; Storey v. Storey (Tex. Civ. App.), 105 S. W. (2d) 370.

Respondent Shell Oil Company also states and argues that Hugh Henderson had been adjudged insane by a Missouri court. This is absolutely false and untrue. Even if the evidence of record warranted that statement and argument (which it does not), it would not aid the illegal seizure and confiscation of petitioner's property. The sanity-guardianship proceedings in Texas in 1918 and 1939, culminating in the purported appointment of a Texas guardian for Hugh Henderson, do not even purport to be based on any adjudication by a Missouri court that Henderson was insane. Article 4285, Vernon's Revised Civil Statutes of Texas, provided:

> "Where a guardian and his ward are non-residents, such guardian may file in the County Court of any county where all or part of the ward's estate is located, a full and complete transcript from the records of a court of competent jurisdiction where he and his ward reside, showing that he has been appointed and has qualified as guardian of the estate of such ward * * * and upon the filing of such transcript * * * the guardian shall be entitled to receive letters of guardianship of the estate of such minor, person of unsound mind, or habitual drunkard, situated in the state * * *."

An examination of the applications filed in the Texas County Court which appear at pages 51 and 55, respectively, of the printed record, and an examination of all of plaintiff's exhibits number 44, being all of the proceedings in the County Court of Clay County, Texas, in regard

to Hugh Henderson, reveal no mention of any adjudication by any Court in Missouri (where it was alleged that Hugh Henderson resided) that Hugh Henderson was insane or that a guardian had been appointed for him. The reason no mention was made of such was because there had been none. The attempt by respondents to mislead this Court to believe that there was such an adjudication clearly is a confession by them that there is no merit to their contentions.

The "notice" which was served on Hugh Henderson in Missouri in connection with the 1939 sanity-guardianship proceeding upon which Respondent Shell Oil Company now seeks to rely, confers no jurisdiction. That "notice" must be an invention of the legal department of Shell Oil Company. The Legislature of Texas has not provided for any such notice and the Texas Courts said so in this very case. It appears on page 72 of the printed record that the Court of Appeals of Texas said:

> "A sort of non-resident notice was served on Hugh Henderson in Missouri,"

and on page 77 of the record that the same Court said:

> "Neither in 1918 nor in 1939 was there any Statute in Texas authorizing non-resident notice in a guardianship proceeding."

These statements were confirmed by the Supreme Court of Texas, as appears from page 90 of the printed record, where it is said:

> "In addition, some sort of non-resident notice was served on Hugh Henderson in Missouri."

And again at page 92 of the printed record where it appears that the Supreme Court of Texas said:

> "Prior to 1941 (47th Leg., p. 867, ch. 541) there was no Statute in Texas authorizing non-resident notice in a guardianship proceeding for a person of unsound mind."

Of such a situation, this Court said in Coe v. Armour Fertilizer Works, 237 U. S. 413, 424:

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Rees v. Watertown, 19 Wall. 107, 123.

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S. B. Co. v. Lexington, 203 U. S. 323, 333, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute' (citing the New York case). So, in Central of Georgia R. Co. v. Wright, 207 U. S. 127, 138, the court said: 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' In Roller v.

> Holly, 176 U. S. 398, 409, the court declared: 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' And in Louisville & N. R. Co. v. Central Stock Yards Co., 212 U. S. 132, 144, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such.' "

Hugh Henderson's physical presence in the County courtroom in Texas in 1939 was not an "appearance" in the proceeding. The evidence of what happened in the County courtroom in Texas on that occasion was not printed in this Court. It was not considered necessary by either party at the time the record to be printed was agreed upon. However, the contentions of the respondents make it necessary to refer to the original record in this regard. Pages 51-53, 55-56 and page 66 in Volume 1 and Plaintiff's Exhibit 44 in Volumes 2 and 3 of the transcript of the record on file in the office of the clerk in this court, disclose that, while Henderson was physically present in the courtroom, he did not sign any papers, he said nothing, nothing was said to him, he had no attorney and no guardian ad litem, he was not placed on the witness stand, no questions were asked him, and he asked no questions. From all that appears in the record he may have just been enticed under some subterfuge to walk in and out of the courtroom, perhaps looking for some one or something. It is the law of Texas as stated in 4 Tex. Jur. 624, that: "The mere presence of the defendant in Court when his case is being tried, is insufficient," to constitute an appearance. And so also it is generally held that one who is alleged to be insane cannot waive the issuance and service of process. North v. Washtenaw, 59 Mich. 624, 26 N. W. 810. Snyder v. Superior Court, 206 Cal. 346, 274 Pac. 337; State ex rel. Terry v. Holtcamp, 330 Mo. 608, 51 S. W. (2d) 13; Story v. Story (Tex. Civ. App.), 105 S. W. (2d) 370.

There was no seizure of Hugh Henderson's Texas property by any officer of the County Court in Texas in either of the proceedings against him. There was not even an attempt made to seize any property. The applications for appointment of a guardian previously mentioned, which appear at pages 51 and 55 of the printed record, and the process issued by the County Court, which appears between pages 51 and 61 of the printed record, discloses that no property was described in the proceedings, and that Hugh Henderson owned any property was mentioned only generally. There is no statement by the sheriff of Clay County, Texas, who executed the process in those cases in that county, that he seized any property. Plaintiff's Exhibit 44, which is the full transcript of the proceedings in the County Court, discloses that the first time the property belonging to Hugh Henderson which is involved in this proceeding, is mentioned was in the inventory filed by the guardian purportedly appointed after the supposed adjudication that Hugh Henderson was insane.

The decision of this Court in Chaloner v. Sherman, 242 U. S. 455, does not determine the questions here involved. It does not support the decisions of the Texas courts as claimed by Respondents. The following quotation from the opinion in that case discloses the difference in that case and the instant case, where the Court said (242 U. S. 457-8, and 462):

> "The proceedings were held in New York City where much of the plaintiff's property was located. For over two years prior to the entry of the earlier order plaintiff had been an inmate of Bloomingdale, a private hospital near that city. At each stage in the proceeding leading up to the order of June 23, he was personally served with notice • • • That court had jurisdiction because the plaintiff and his property were in New York."

If Hugh Henderson had been served personally with process in Texas, in the Texas proceedings, and if his property had been seized in either of those proceedings, the situation presented by this case might be controlled by the decision in the Chaloner case, but Henderson was not served personally in Texas and his Texas property was not seized prior to judgment.

The efforts of respondents to avoid a decision on the merits are further evidence of the validity of Petitioner's contention that the writ of certiorari should be granted and the question of what is due process of law in insanity and guardianship proceedings determined and declared by this Court. Is there really a difference in the process required for due process of law when the proceeding is to determine the sanity and appointment of a **guardian of the estate**, and when the proceeding is to determine sanity and to appoint a **guardian of the person** as well as of the estate? Some of the decisions could be so interpreted. Is there really a difference in the required process, depending on whether the purpose of the proceeding is to **conserve or to sell** the property of an alleged insane person? Some of the decisions would so indicate. Is there really a difference in the process necessary for due process of law depending on whether the property to be affected is owned by a resident or non-resident? It seems that the full faith and credit clause of the Constitution of the United States would preclude any such holding. If a non-resident of Texas may be determined to be insane by the Texas Courts merely because he owns land in the State of Texas, then that judgment should be entitled to full faith and credit in the state where the land owner resides, so that the acts of the land owner in the state of his residence might be avoided by a judgment of insanity rendered against him in some foreign state. The mischief which the full faith and credit clause could work if the rule of due

process of law announced by the Texas Courts is allowed to stand and spread would be untold.

For these reasons and the reasons stated in the Petition for Writ of Certiorari, and the brief in support thereof, Petitioner respectfully prays that the Writ of Certiorari be granted.

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